

file

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

Application of Gregory Kozloski to Dredge Part)	
of the Suamico River, Town of Suamico, Brown)	Case No. 3-LM-93-728
County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gregory Kozloski, applied to the Department of Natural Resources for a permit pursuant to § 30.20, Stats., to remove material from a backwater/wetland area of the Suamico River. The proposed project is located in the Town of Suamico, Brown County, Wisconsin.

On February 17, 1994, the Department of Natural Resources denied the application. The Department received a request for administrative hearing pursuant to § 227.42, Stats., from Mr. Gregory Kozloski by his attorney.

On August 31, 1994, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals. The Division of Hearings and Appeals conducted a hearing on January 9, 1995 in Green Bay, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Greg Kozloski, applicant, by

Attorney Terry J. Gerbers
849 Cormier Road
Green Bay, WI 54304-4728

Department of Natural Resources, by

Attorney Michael J. Cain
P. O. Box 7921
Madison, WI 53707-7921

Richard and Bonnie Flaeschel, by

Attorney Thomas L. Schober
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P. O. Box 1780
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FINDINGS OF FACT

1. Gregory Kozloski owns property located in the SE 1/4 of the SE 1/4 of Section 14, Township 25 North, Range 20 East, Town of Suamico, Brown County, Wisconsin. The mailing address for the property is 1195 Sunset Beach Road, Suamico, Wisconsin. The property is located on the north side of the Suamico River.
2. On November 26, 1993, Gregory Kozloski applied to the Department of Natural Resources (Department) for a permit to remove approximately 13,000 cubic yards of material from a backwater/wetland area of the Suamico River. On February 17, 1994 the Department denied the application. On February 28, 1994, Gregory Kozloski by his attorney requested a hearing to review the denial. The Department and the applicant have fulfilled the procedural requirements of §§ 30.20 and 30.02, Stats., including preparation of an environmental assessment. As part of its environmental assessment, the Department determined an Environmental Impact Report was not required.
3. The purpose of the project is to construct a marina which will be connected to the Suamico River. According to the application, the area proposed to be dredged is roughly rectangular in shape and is approximately 125 yards long by 25 yards wide and five feet deep. The proposed marina will be bounded on the east by the Suamico River (the Suamico River bends in a northeasterly direction as it passes the Kozloski property), on the north and west by property owned by Gregory Kozloski, and on the south by a sliver of land owned by Josephine Gokey. The Gokey property separates the proposed marina from the Suamico River.
4. The area to be dredge is classified as an emergent wetland on the wetland inventory map. The vegetation in this area consists primarily of cattails and sedges. The project would destroy approximately one acre of wetlands. Although it is difficult to quantify the impact of destroying one acre of wetlands, the cumulative impact of destroying numerous small wetland areas is significant. Approximately ninety percent of the original marshes in the Lower Green Bay-Fox River ecosystem were lost between 1834 and 1975. Development pressure results in the loss of additional wetlands in the area each year. The Department is required to consider the cumulative impact on wetlands when investigating permit applications. Section NR 103.08(3)(d), Wis. Adm. Code.

5. Wetlands in general provide valuable fish and wildlife habitat. Wetlands such as those on the Kozloski property are used by various species of fish, such as northern pike and forage species for spawning and nursery activities. These wetlands also support abundant invertebrate and vertebrate populations which provide food for fish species. Wildlife which are using or potentially could use the subject wetlands include deer, fur-bearing and other small mammals, songbirds, reptiles and amphibians.

6. Wetlands, such as the area on the Kozloski property, are valuable because they retain and/or filter sediments, nutrients and toxic substances from the water. These functions improve the quality of the downstream water.

7. The natural resources board has a stated policy recognizing the values of wetlands, including biological functions, watershed functions, hydrologic support functions and storm and floodwater storage. The policy directs the Department to "give primary consideration to reasonable alternatives, including the alternative of denying requested approval, that avoid adverse impacts on wetlands and that result in the least overall adverse environmental impact." Section NR 1.95, Wis. Adm. Code.

8. The marina as proposed would provide slips for approximately forty boats. The Kozloski property is approximately one mile by water from Green Bay-Lake Michigan. The Suamico River is heavily used by boaters and demand exists for additional slips.

9. Gregory Kozloski has a permit from the Department to construct finger piers for twelve boat slips on his property. So far he has constructed slips for six boats. Other areas of the Kozloski property are suitable for additional finger piers.

10. The existing finger piers on the Kozloski property extend into the Suamico River. An advantage of the marina project is that the piers would be removed from the flow of the Suamico River. This would reduce congestion on the river.

11. Although the alternative of constructing additional piers extending into the Suamico River does not have the benefit of reducing congestion on the river, it is an alternative available to Gregory Kozloski which would not destroy any wetlands area.

12. An alternative also exists for Gregory Kozloski to construct a marina on an upland area of his property. Constructing the marina on an upland area would not involve the destruction of wetlands.

13. Constructing additional finger piers extending into the Suamico River or constructing a marina on an upland area are practicable alternatives available to Gregory Kozloski which will not adversely affect wetlands and will not result in other significant adverse environmental consequences.

14. The proposal to remove material from a wetland on the Kozloski property to construct a marina does not satisfy the requirements of Ch. NR 103, Wis. Adm. Code.

15. The construction of the proposed marina is not in the public interest considering ecological, aesthetic, economic and recreational values.

CONCLUSIONS OF LAW

1. Pursuant to § 30.20, Stats., no person may remove any material from the bed of any lake or stream without first obtaining a permit from the Department of Natural Resources.

2. Pursuant to § 30.20(2)(c), Stats., the Department may issue such a permit if the Department finds that the issuance of the permit is consistent with the public interest in the waters involved.

3. Pursuant to § NR 2.13(3)(b), Wis. Adm. Code, the applicant in this matter has the burden of proof to show the issuance of the permit is consistent with the public interest.

4. Section NR 103.08(4)(a)2, Wis. Adm. Code, requires the Department to make a finding that the requirements of Chapter NR 103, Wis. Adm. Code, are not satisfied if a "practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences."

5. Pursuant to § 150.03(8)(f)1, Wis. Adm. Code, the project is a type II action. Pursuant to § 150.20(1)(c), Wis. Adm. Code, type II actions require the preparation of an environmental assessment.

6. Pursuant to § 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority by its Administrative Law Judge to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department of Natural Resources to deny the application of Gregory Kozloski to remove material from a backwater/wetland area of the Suamico River to construct a marina is affirmed.

Dated at Madison, Wisconsin on February 7, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.